

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
DOCKET # [REDACTED]

COMMONWEALTH

v.

[REDACTED]

COMMONWEALTH'S MEMORANDUM IN OPPOSITION

I. Commonwealth's Proposed Facts

Defendant [REDACTED] had been a familiar face to the members of the D-14 Drug Control Unit long before the present offense. On April 12, 2008, [REDACTED] had been arrested by members of the unit for drug related charges as well as for Operating After Revocation. Besides the 2008 incident, Officers Boyle and Nunez (both of D-14) had each individually arrested [REDACTED] on separate occasions. Moreover, not long before the present offense, the Newton Police Department had informed Unit D-14 that [REDACTED] had recently been selling heroin in Newton and the Allston/Brighton area. Finally, just prior to July 16, 2009, members of the unit had been made aware of the fact that [REDACTED] driver's license had been revoked.

On July 16, 2009 at around 8 p.m., Officers Boyle and Nunez of the D-14 Drug Control Unit saw the defendant pulling out of Kelly Court and taking a right onto Western Avenue, driving a black Acura (Mass. Reg. [REDACTED]). Operating at what appeared to be a very high speed, [REDACTED] turned into a parking lot and from there, drove onto Soldier's Field Road.

Knowing [REDACTED] to have a revoked license, Boyle and Nunez, who had been driving an unmarked vehicle along Western Avenue, turned onto Soldier's Field Road in an attempt to apprehend the defendant. As they did so, [REDACTED] swerved past the officers, nearly colliding with their vehicle and beeping his horn. At this point, Boyle and Nunez reported their location and a description of the defendant's vehicle to the Channel 5 dispatcher. The officers also requested the assistance of a marked police unit to help stop [REDACTED] car.

[REDACTED] continued to swerve in and out of traffic, failing to use his directional signals and forcing nearby motorists to apply their brakes in order to avoid collision. Despite his reckless driving, Boyle and Nunez managed to follow [REDACTED] as he approached Storrow Drive and eventually pulled off at Beacon Street near Kenmore Square.

At the intersection of Beacon and Raleigh Street, [REDACTED] vehicle stopped at a red light and Boyle and Nunez took this opportunity to exit their car and approach [REDACTED] on foot. With their badges clearly displayed, both officers neared the vehicle and loudly announced, "Boston Police." The defendant made direct eye contact with Boyle, yet he ignored the officer's direction and instead attempted to flee by swerving to the left and driving forward a short distance until he could no longer continue due to stopped cars waiting at the traffic light. Again, Boyle and Nunez approached [REDACTED] vehicle, shouting loudly, "Boston Police! Stop! Show me your hands!" and again, [REDACTED] made eye contact with the officers but refused to open the car door. Instead, [REDACTED] placed his right hand near his right hip in what appeared to be an attempt to conceal an object in his pants. After completing this furtive movement, he finally opened the driver's side door and allowed Boyle to escort him out of the car.

The officers placed [REDACTED] under arrest for operating after revocation and failure to submit to officers. While being searched at the scene, [REDACTED] displayed some suspicious behavior: he appeared to be clenching his buttocks and each time Boyle touched his waist or buttock area, [REDACTED] turned his body away from the officer. After the search at the scene, the defendant was transported to police headquarters.

In light of the police officers' own experience in dealing with criminals, their prior knowledge of [REDACTED] past drug convictions, and their observation of [REDACTED] suspicious behavior at the scene of his arrest, the officers requested permission to strip search the defendant. Lieutenant Crowder granted this permission and Detective Conley and Officer Boyle conducted a strip search of the defendant in a private and secure area. During the search, the officers found hidden near the buttocks region a medium sized plastic bag of a tan, rock like substance believed to be heroin.

II. Argument: This Court should deny the defendant's motion to suppress evidence because the officers were permitted to make an investigatory stop of [REDACTED]

Police officers are permitted to make investigatory stops when they hold reasonable suspicion that "a person has committed, is committing or about to commit a crime." Commonwealth v. Comita, 441 Mass. 86, 91 (2004). Here, the police officers had legitimate reason for stopping [REDACTED] (1) officers saw the defendant threaten public safety by committing multiple traffic violations; (2) the officers knew firsthand that [REDACTED] was driving with a revoked license and; (3) the officers had been informed by Newton police that [REDACTED] had been dealing heroin in the area.

Given that officers acted permissibly in stopping [REDACTED] their initial frisk of the defendant was also lawful. The frisk can be justified as a Terry-type search, having a protective purpose of ensuring that the police can pursue appropriate investigation without fear of violence. Commonwealth v. Almeida, 373 Mass. 266, 270-71 (1977). Frisking the defendant was done in the interest of public safety because the officers knew that [REDACTED] had committed a crime (driving with a revoked license) and had attempted to flee from the police. Thus, they had specific, articulable reason to suspect that he might be armed or dangerous. See Commonwealth v. Johnson, 454 Mass. 159, 162 (2009) ("The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger.") (internal citations omitted). Additionally, the pat frisk can be justified as a search incident to a lawful arrest.

Massachusetts law permits strip searches incident to lawful arrest when the search is conducted for the following purposes: (1) to seize evidence of the crime for which the arrest has been made in order to prevent its destruction or concealment or (2) to remove any weapons that might be used to resist arrest or escape. See Commonwealth v. Prophete, 443 Mass. 548, 552 (2005); G.L. c. 274 § 1. Although the police had heard that the defendant had been distributing drugs, this tip did not provide the requisite probable cause to justify the defendant's arrest. Rather, the arrest was based on the fact that [REDACTED] had been operating a vehicle after his license had been revoked and had failed to submit to the police. Thus, the strip search cannot rest on the first prong of justification. See Commonwealth v. Thomas, 429 Mass. 403, 408 (1999) ("[P]robable cause is the

appropriate standard to apply to strip and visual body cavity searched") .

However, the second prong does provide legitimate reason for the strip search. Police have a right to search for concealed weapons on an arrestee, and in the present case, the defendant's furtive movements, his suspicious behavior during the pat frisk, and the officers' own observation of [REDACTED] placing something in his pants provided the necessary probable cause to warrant a valid strip search.

As in Commonwealth v. Prophete, here: (1) the defendant refused to stop for the police; (2) after fleeing, the defendant likely anticipated getting arrested and, thus, had a motive for hiding drugs securely under his clothing; (3) the police had previously arrested him for drug activity; (4) having conducted a pat frisk and only locating a cell phone and large amount of cash, officers believed the defendant to have drugs concealed on his person; (5) officers' suspicions were only increased by the fact that the defendant appeared to be clenching his buttocks and each time PO Boyle touched his waist or buttock area, [REDACTED] turned his body away from the officer.

III. CONCLUSION

Defendant's motion fails for the preceding reasons and the Commonwealth requests this Court deny the motion.

RESPECTFULLY SUBMITTED
FOR THE COMMONWEALTH,
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I hereby certify that a copy of the above
document was served to defense counsel
in hand/by mail/by fax on November 16, 2010.

Melissa L. Brooks, A.D.A.